Case 30. Dalrymple, 9 June 1714.

The Gubernators of Heriot's Hospital, and James Young their Treasurer, - - *Appellants*;
Robert Hepburn of Bearford, - - *Respondent*.

2d, *June* 1715.

Kirk Patrimony.—The superiority of certain church lands, which were purchased from the crown for an onerous consideration, and which were specially excepted in the act 1633, c. 13. "anent regalities of erection," part of the general re-annexing acts, found to be in such purchasers, where the vassal had taken charters and infeftments from the subject superior for near 100 years.

THE lands of the popish clergy soon after the reformation in Scotland fell to the crown, and his then Majesty King James the 6th granted great part of these church-lands to certain noblemen and gentlemen, and erected them into temporal lordships. Sir William Ballindine had a grant from his majesty of the estate, which had belonged to the abbey of Holy-Rood-House, which comprehended the barony and regality of Broughton and Canongate. By the act of parliament 1587, c. 29. the temporalities of all benefices and church lands were re-annexed to the crown; but with an exception in the following words, "Our Sovereign "Lord and the estates have declared, and by the tenor hereof "declare, decern, and ordain that the lands, lordships, baronies "under-written, &c. are not nor shall not be comprehended in "the said annexation, excluding the same allutterly therefrae, to "remain with the persons to whom they were first disponed after "the form and tenor of the infeftments made to them thereof." Then follows an enumeration of the exceptions, among which is the *barony of Broughton*.

1587. c. 29.

In 1627, Sir William Ballindine, among other lords of erection, signed the submission to Charles the First, upon which his majesty's decreet arbitral afterwards proceeded. In the same year 1627, Sir William, for an onerous consideration sold and conveyed the said lands to Robert Earl of Roxburgh: And in 1630, the Earl, with consent of Sir William Ballendine, sold and conveyed the same to King Charles the First, for the price of 280,000 merks Scots. This sum, however, not being paid, the King granted to the Earl a wadset over the lands in security of the said sum, under the great seal, on which the Earl was infeft.

1633, c. 10. & 14.

In 1633, several acts of parliament were passed in consequence of the King's decreet arbitral. By c. 10. & 14. the superiorities of all church lands are annexed and declared to remain with the crown for ever, and all rights and settlements whatsoever made and granted to any person or persons by his then majesty or his predecessors, preceding the date of the said acts, are declared void and null. In c. 13. of these acts, which is entitled "*Anent Re-"galities of Erections*," it is "declared, decerned, and ordained, "that the lands and barony of Broughton," and others "mentioned "in

c. 13.

" in the infeftment granted by his majefty under his highnefs's
" great feal, to his highnefs's right trufty coufin and counfellor
" Robert Earl of Roxburgh, of the date the day of
" 1630 years, fhall not be comprehended herein, excluding the
" fame allutterly therefrom, to remain with the faid Earl, his
" heirs and fucceffors, after the form and tenor of the infeft-
" ments made to him and his authors of the fame."

In 1637, a tranfaction took place between his then majefty and the appellants; and the king, by a deed, bearing to be with confent of his exchequer, and of Robert Earl of Roxburgh, fold and in the moft ample manner difponed to the appellants, the faid barony and regality of Broughton and Canongate, and *in verbo principis*, promifed to obtain an act of parliament diffolving thefe lands from the crown, and declaring that it was the meaning of the king and parliament, that the exception in favour of the Earl of Roxburgh, contained in the faid 13th act was ordained and intended to have been a quality of the faid 14th act alfo: and in confideration thereof, the appellants paid off the Earl of Roxburgh's wadfet, amounting to 11,000*l.* fterling, and further paid the fum of 3000*l.* fterling to the crown. In 1641, a *private* act of parliament was paffed declaring "That the lands and barony " of Broughton fhall be by no means efteemed to be compre- " hended within the 14th act of the firft parliament of King " Charles the Firft; but the words, excepting the regality and " and barony of Broughton, fhall be efteemed as inferted in that " 14th act in the year 1633 above mentioned."

1661, c. 15.

In 1661, an act of parliament was paffed, refcinding all acts paffed in the parliament 1641, but it contained a provifo or declaration in thefe words, " And it is hereby declared, that all acts, " rights, and fecurities paffed in any of the pretended meetings " above written, or by virtue thereof, in favours of any particular " perfons for their civil and private interefts fhall ftand good and " valid unto them until the fame be taken into further confideration, " and determined in this or the next feffion of this parliament."

1661, c. 53.

Another act of parliament was paffed fame year, ratifying the annexation acts of 1633, by which all and whatfoever grants, rights, or infeftments of the faid fuperiorities made or granted by his then majefty, or his father King Charles the Firft, at any time fince the fubmiffion in 1627 are refcinded and declared void and null, with the exception of one infeftment in favours of John Earl, afterwards Duke of Lauderdale. And this act befides, holds all exceptions contained in the acts of 1633, as contained in that act, and contains a provifo or declaration, by which it is always declared, that " notwithftanding of this act, any who have gotten " or fhall get any new infeftment of fuperiority of Kirk lands, " the fame fhall ftand good as to fuch vaffals, who have given " their confents to the faid right of fuperiority; in regard that " fuch a confent as to his majefty is of the nature of a refignation " of their property in favours of the faid fuperior."

The refpondent was proprietor of the lands of Lochbank, part of the faid barony of Broughton, which had been acquired by

the appellants in manner before-mentioned. Theſe lands had been held by the reſpondents predeceſſors, without challenge, from the appellants as ſuperiors thereof, and the latter had granted ſundry charters and precepts of Clare Conſtat to the former as their vaſſals, from 1641 downwards. But the reſpondent claiming to hold his lands of the crown, the appellants brought an action of declarator of non-entry againſt him before the Court of Seſſion; and the reſpondent brought a counter action of declarator againſt them, concluding that his privilege might be declared to hold *in capite* of the crown. Both cauſes being heard before the Court of Seſſion, an interlocutor was pronounced on the 13th of February 1714, by which it was "declared that the reſpondent "was acquitted from all claims of ſuperiority for his lands of "Lochbank at the appellants' inſtance; and that the reſpondent, "his heirs and ſucceſſors, had the undoubted right and privilege "to enter vaſſals, and hold the fee of thoſe lands of his majeſty "and royal ſucceſſors the immediate lawful ſuperiors thereof." The appellants having reclaimed againſt this interlocutor, the Court, on the 9th of June 1714, "adhered to their former in-"terlocutor, and found that the arguments and acts of parlia-"ment made uſe of and produced by the appellants did not ex-"eem the ſuperiority of the lands in queſtion from the annexa-"tion made by the 10th and 14th acts of the parliament 1633, "and therefore decerned in favour of the reſpondent."

arguments

Entered 22 June 1714.

The appeal was brought from "an interlocutor or ſentence of the "Lords of Council and Seſſion, dated the 13th day of February, "1713-14, and the affirmance thereof on the 9th of June 1714."

Heads of the Appellants' Argument.

By the act 1633, c. 14. the ſuperiorities of ſuch church lands only were annexed to the crown, the original grants of which ſtood merely upon charters from the crown. But the barony of Broughton, which comprehends the ſubject of the preſent debate, was not in that ſituation; for though it had been originally granted by a charter from the crown, yet that grant was not only excepted from the general act of reſumption and annexation paſſed in 1587, but the ſaid grant was confirmed and appointed to remain with the grantees according to the ſaid charter and infeftments. Thus the right ſtood and ſtands on the foot of a public law not repealed expreſsly, nor by any neceſſary conſequence. 2dly. The king having for an onerous or valuable conſideration purchaſed this barony, and not having paid the price, *ſimul et ſemel*, wadſet it for the price; and it cannot be imagined, that the king and parliament meant by the general words of the ſaid act 1633. c. 14. to deprive the Earl of Roxburgh, under whom the appellants claim, of his wadſet. 3dly. This is the more evident, becauſe in the 13th act, paſſed the ſame day in the ſaid parliament 1633, the above reſervation is expreſſed in the moſt ample manner, not with regard to the juriſdiction of regality only, but alſo with regard to the lands and barony of Broughton, comprehending the milns and others thereto belonging. It were indeed to ſuppoſe, a thing

thing againſt all equity and reaſon, that the very next ſubſequent chapter of theſe acts ſhould be deemed to take away the benefit of this exception without an expreſs reſcinding clauſe or reaſon aſſigned; and indeed whoever is acquainted with the hiſtory of theſe acts of parliament, containing reſumption of the temporality of juriſdictions and offices of church lands knows that theſe were not properly diſtinct acts, but ſeveral heads of one great ſettlement, the printing and forming of which were of courſe left to the clerk-regiſter, who has made the 14th act the laſt, though by the very tenor of the 13th act it appears, that it was the laſt in order, and the exception was inſerted in that place as an exception from the whole annexation: It, therefore, excepts not ſpecially the juriſdiction of regality which is the ſubject of the act, but the barony and lands, which were no part of the ſubject of it regularly. 4thly. As this muſt be good to defend the wadſet for the ſaid ſum of 11,000*l.* ſterling, ſo it ought to defend the reverſion which was fairly purchaſed for the additional price of 14,000*l.* whereof the 11,000*l.* was paid to the Earl of Roxburgh, and the remaining 3,000*l.* to the crown, for which the hoſpital have not of yearly income above 200*l.* To ſatisfy the niceſt ſcruple, too, it was covenanted on the part of the crown to procure an act of parliament, declaring that it was the meaning of the king and parliament, that the exception in favour of the Earl of Roxburgh, contained in the ſaid 13th act, was ordained and intended to have been a quality of the ſaid 14th act alſo. And accordingly there was an act of parliament paſſed in 1641, in theſe terms, and that not in the terms of a common ratification, but as a private act, confirming the king's deed done with advice of his council in that matter for a very valuable conſideration paid and performed by the hoſpital.

This laſt mentioned act 1641 is not repealed by the reſcinding act 1661, c. 15.; for this reſcinding act contains an exception of all *private* acts paſſed in that parliament, of which nature is the act in favour of the appellants. The reſpondent objected, that this laſt exception was not abſolute, but temporary; till thoſe private acts ſhould be taken into further conſideration in that or the next ſeſſion of parliament; but that the caſe of all the church lands was taken into conſideration in theſe ſeſſions: there never was, however, any act of parliament ſubſequent to the laſt above-mentioned reſcinding act, which in any manner of way had under conſideration any of the church lands, ſo that the 15th act of the parliament 1661 ſtill ſtands good and valid.

It is to be remembered, too, that the king was in poſſeſſion of thoſe lands in fee, upon paſſing the above-mentioned act 1633. But if the reſpondent had any right or title, as he pretends, to the ſuperiority of the above-mentioned lands, he would be debarred by the act of parliament 1617, c. 12., "Anent Preſcription of "Heritable Rights," by which it is enacted, "that whoſoever "his majeſty's leiges, their predeceſſors and authors, have "bruiked or enjoyed heretofore or ſhall happen to brook in time

1617, c. 12.

"coming

" coming by themſelves, their tenants, and others having their
" rights, their lands, baronies, annual-rents, and other heritages,
" by virtue of their heritable infeftments made to them by his
" majeſty, or others their ſuperiors and authors, for the ſpace of
" 40 years, &c. that ſuch perſons, their heirs, and ſucceſſors,
" ſhall never be troubled, purſued, or inquieted in the heritable
" right and property of their ſaids lands and heritages foreſaids by
" his majeſty, or others their ſuperiors and authors, their heirs
" and ſucceſſors, nor by any other perſon pretending right to the
" ſame by virtue of prior infeftments, public or private, nor upon
" no other ground, reaſon, or argument, competent of law, ex-
" cept for falſehood."

Beſides the reſpondent and his predeceſſors, in virtue of the the clauſe of the before-mentioned act 1661, c. 53. are debarred from holding of the crown, for his predeceſſors have for almoſt 100 years " given conſent to the ſaid right of ſuperiority," and taken their charters from the hoſpital accordingly.

Heads of the Reſpondent's Argument.

The acts or ſtatutes of annexation are general, and comprehend all ſuperiorities of church lands whatſoever, and make no diſtinction whether the grant had been for an onerous conſideration or not, and whether before or after the annexation. Particularly the before recited act 1661, c. 53. does reſcind all grants made by King Charles the Firſt, except that in favour of the Duke of Lauderdale, which confirms the rule and law as to all other grants not excepted. Though the grant made to the Earl of Roxburgh, and by him to the appellants, might have been for onerous conſiderations; yet the firſt grant was in favour of Ballindine of Broughton, and it does not appear that his grant was for any onerous conſideration, and he is one of thoſe who ſubſcribed the ſubmiſſion to the king in 1627, upon which the acts of annexation followed.

With regard to the act 1633, c. 13. relied on by the appellants, there is a great diſtinction between a regality and a ſuperiority. Several of the church lands having been erected into regalities in favour of the biſhops and abbots, whereby they had a power over their tenants and vaſſals in civil and criminal matters; theſe were alſo annexed to the crown, with the exception in favour of the Earl of Roxburgh, ſo that the vaſſals of that regality remained ſubject to the earl's juriſdiction or power. But this is different from the ſuperiority; a convincing proof of which is, that the very next act, c. 14. annexes the *ſuperiority* of all church lands to the crown, without any exception in favour of the Earl of Roxburgh: and the act 1667, c. 53. reſcinds all grants made by King Charles the Firſt, except that in favour of the Duke of Lauderdale. But what fully anſwers the appellants' argument on this head is, that when the Earl of Roxburgh in 1637 ſold the lands of Broughton, with conſent of the king, to the appellants, his majeſty promiſes in the next parliament to procure theſe lands diſſolved

dissolved from the crown, so that if they had not been annexed, there was no occasion for such an act.

But this was never done, nothing was obtained in the parliament 1641, but a simple ratification passing in course on the last day of the parliament, among 300 more, of which this is the 135th: they were never printed among the other acts of parliament, but passed of course, and might be obtained by any person who demanded them; and they can never prejudge the interest of a third person having a prior right, which is the case of the respondent. His right is preserved by the act *Salvo jure cujuslibet,* which is always the last act of every parliament. But dissolutions of superiorities that had been annexed to the crown must be by such public acts of parliament as pass with all the deliberation and solemnities of the acts of annexation, and have the royal assent, which is not pretended to have been the case with the act 1641.

With regard to that part of the act 1661, c. 53, founded on by the appellants, There being a publick law annexing these superiorities to the Crown, no deed of the vassals could without consent of the Crown deprive it of that superiority, but according to the tenor of the exception contained in this last-mentioned act, which is an express consent by some writing from the vassal. This is clear by the words of the statute, viz. "In regard such a consent, as to his majesty, is of the nature of a resignation," or giving over the lands to the superior to be holden of the king. So, this consent was to be by such an express and positive deed in writing, as was equivalent to the vassals surrendering to the king; and the same vassal continuing only to take charters, or new titles, from those who had been lords of erection, was but a temporary expedient, and a consent by implication, and not equivalent to a resignation in the Crown's hands required by the statute.

Nor can the act 1617, c. 12, with regard to prescription take place here, for the appellants' contract in 1637 was entirely cut off as to the right of superiority, by the act 1661, c. 53, and so was no title of prescription unless it had been renewed after the said act. The possession for forty years, by the law of Scotland, gives no right, where the person claiming it has no title, and when the defender has it in his choice to act and do this or that way, (which by the doctors of the civil law is called *actus meræ facultatis,*) except he had given a positive writing binding him to it. This is confirmed by all the eminent Scots Lawyers who write on this subject, and is the constant practice of the Lords of Session in the like cases. Nor is it to be doubted but that the crown in this case can oblige the respondent to take his charters or titles, immediately from it as vassal to the crown, because no deed done by the vassal can prejudge the sovereign without his own consent.

Judgment, 2 June 1715.

After hearing counsel, *It is ordered and adjudged that the said interlocutor or sentence, and the affirmance thereof complained of in the said appeal, be reversed; and it is ordered and declared, that the supe-*

ſuperiority of the lands in queſtion, called Lochbank, lying within the barony of Broughton, ſhall belong to the appellants.

For Appellants, *David Dalrymple. Sam. Mead.*
For Reſpondent, *Edward Northey. Spencer Cowper.*

The judgment here reverſed is founded on in the Dictionary voce *Kirk Patrimony*, vol. 1. p. 531.

Caſe 31. The Corporation of Butchers in Edinburgh, *Appellants*;
The Magiſtrates of Edinburgh, and Corporation of Candlemakers there, - - *Reſpondents.*

29th *June* 1715.

Burgh Royal.—The Court of Seſſion having found that the butchers of Edinburgh ſhould be reſtrained from rinding tallow for ſale, and that the magiſtrates could oblige them to ſell their tallow at a certain price to the candlemakers, which was in terms of a bye-law of the magiſtrates, ratified by a private act of parliament, the judgment is reverſed.

Act of parliament 1540, *c.* 123.—This act was not ſufficient to reſtrain the butchers from melting or rinding their tallow.

1424, c. 32. 1540, c. 123.

BY an act of parliament 1424, c. 32. it is enacted, " that na " Taulch be had out of the realme, under the paine of eſ- " cheitte of it to the king." By another act of parliament 1540 c. 123. it is enacted, " that na maner of man, fleſchour nor " others, to burgh nor to land, take upon hand to rinde, melt, " nor barrel tallun, under the paine of tinſel of all their gudes."

The magiſtrates of Edinburgh, by a regulation or bye-law, dated the 15th of September 1517, diſcharged all the inhabitants of the burgh, other than the candle-makers from melting tallow or making candles, except for their own uſe and to burn in their own families. By another regulation or bye-law, dated the 10th of October 1551, the magiſtrates ordained, that no butcher or other perſon within the ſaid burgh, ſhould ſell any tallow to ſtrangers or inhabitants of other towns, but to the neighbours and candlemakers thereof; and that no freeman, other than the candlemakers, by themſelves or ſervants, ſhould melt any tallow for making of candles, beyond what they made for their own uſe, under the pain of eſcheat thereof, payment of 5*l.* to the common works, and *baniſhing the town.* King James the 6th, on the 4th of May 1597, by a ratification of privy council, and a grant under the great ſeal, not only ratified the ſaid acts and ordinances of the magiſtrates, but all ſuch further rules and conſtitutions as ſhould be thereafter made in favour of the candle-makers.

By another regulation or bye-law, dated the 27th of September 1693, the magiſtrates ordained, " that the price of rough tallow " ſhould not exceed 48 ſhillings Scots per ſtone, and that the " price of candles ſhould be 58 ſhillings Scots per ſtone; and " that